

No. 11895

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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PETE FIAMENGO and NICK MARINKOVICH,

*Appellants,*

*vs.*

D/S "SAN FRANCISCO", her engines, tackle, furniture,  
apparel, etc., and ANDREW ZAMBERLIN, FIRST DOE and  
SECOND DOE, her owners,

*Appellees.*

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## APPELLANTS' OPENING BRIEF.

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**APPELLANTS' OPENING BRIEF.**

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**Jurisdictional Statement.**

This is an appeal in Admiralty from a final decree in favor of respondents in the United States District Court for the Southern District of California, Central Division, in an action for wages and maintenance. Appellants were wrongfully discharged as members of the crew of the D/S "San Francisco" April 22, 1947, although they were employed for the tuna fishing season which commenced in January, 1947, and terminated the latter part of July, 1947.

The pleadings in the District Court were a libel *in rem* and *in personam* for wages and maintenance [Ap. 3]; answer of claimants [Ap. 10].

A trial was had before the United States District Court with the Honorable J. F. T. O'Connor, Judge presiding. After hearing the evidence, oral testimony and written documents, proctors for libelants and respondents argued the case. The Honorable Judge then found in favor of respondents upon all issues.

Findings of fact and conclusions of law were signed and filed November 25, 1947 [Ap. 29].

A final decree was signed on November 24, 1947, and entered November 25, 1947 [Ap. 34].

The apostles on appeal, certified by the clerk of the District Court, included the following: petition for appeal with points and authorities [Ap. 36]; order allowing appeal [Ap. 38]; assignment of errors [Ap. 39]; notice of appeal [Ap. 43], statement of points upon which appellants intend to rely [Ap. 44]; praecipe [Ap. 46]; affidavit and order extending time to file apostles on appeal [Ap. 49-50].

The jurisdiction of the District Court over actions, civil and maritime, involving claims for maintenance and cure and damages, arises from Article III, Sections 1 and 2 of the United States Constitution, which provides that the judicial power of the United States shall be vested in the Supreme Court and such inferior courts as Congress may establish, and that such power shall extend to all civil cause of Admiralty and maritime jurisdiction.

Jurisdiction of civil causes of Admiralty and maritime jurisdiction was vested in the courts of the United States by the Act of Congress of September 24, 1789, Chapter 20, Sections 9, 11; Stat. L. 76, 78; 28 U. S. C. A. Section 371.

Appeals from final decrees in Admiralty are authorized by Section 128-a of the Judicial Code, as amended May 9, 1942 (56 Stat. L. 272, 28 U. S. C. A. Section 225), providing that the Circuit Court of Appeals shall have appellate jurisdiction to review by appeal, final decisions.

### **Statement of the Case.**

In January, 1947, appellants were employed as fishermen on board the D/S "San Francisco" at the port of Los Angeles, State of California, for the ensuing tuna fishing season [Rep. Tr. 180]. On April 22, 1947, without any just cause, the appellants' employment on the D/S "San Francisco" was terminated by Andrew Zamberlin, the fish boss and part owner of the D/S "San Francisco" [Rep. Tr. 65, 66, 95, 116, 117, 124, 134, 154].

Had the appellants remained as members of the crew of said vessel until the said vessel was sold in July, 1947, each would have received a gross sum of \$2,632.65, less withholding and social security taxes, for their services from April 22 to July, 1947 [Rep. Tr. 83]. Appellants were unable to obtain remunerative employment from April 22, until July 7, 1947 [Rep. Tr. 69, 82, 90, 91, 121].

At Navidad Bay, Mexico, about one hundred miles south of the United States border, in the middle of March, 1947, appellants, with the knowledge of the Captain and ship boss of the D/S "San Francisco", remained ashore from eleven o'clock p. m. until about four forty or four forty-five o'clock a. m. the following morning [Rep. Tr. 5, 11, 12, 17, 18, 19, 25, 34, 61, 62, 87, 88, 110, 176].

On April 22, 1947, appellants were discharged without explanation [Rep. Tr. 65, 66, 95, 116, 117, 124, 134, 154].

From the evidence, the District Court concluded that libelants were entitled to receive nothing.

### Assignment of Errors.

The assignment of errors upon which the appellants rely are set forth in the appendix to this brief, and are summarized in the following statement of points involved in this appeal.

a. The District Court erred in finding and concluding that the conduct of the libelants constituted valid grounds for their discharge.

b. The District Court erred in finding and concluding that libelants were entitled to no part of what they would have earned had they remained as members of the crew of the D/S "San Francisco" from April 22, until July 7, 1947.

c. The District Court erred in not awarding to each of the libelants the sum of \$2,632.65 for wages, less withholding and social security taxes.

d. The District Court erred in finding and concluding that libelants were not entitled to receive their maintenance from the date of their discharge until they were able to again obtain remunerative employment.

e. The District Court erred in not finding and concluding that the libelants were entitled to receive maintenance in the sum of \$5.00 per day from April 22 to July 6, 1947, inclusive.

### Outline of Argument.

I. This appeal is a trial *de novo*.

II. Appellants were wrongfully discharged.

III. Appellants are entitled to recover the sum of \$2632.65 each, less withholding and social security taxes, as wages.

IV. Appellants are entitled to recover the sum of \$375.00 each for maintenance, from April 23, to July 6, 1947, inclusive.



## ARGUMENT.

### I.

**This Appeal Is a Trial De Novo. No Authority Is Necessary to Establish This Point in the Ninth Circuit.**

### II.

#### **Appellants Were Wrongfully Discharged.**

The evidence is without conflict that on the evening the "San Francisco" was at Navidad Bay, Mexico, most all of the crew of the D/S "San Francisco", and some of the crew of the "St. James" went ashore in the power boat of the D/S "San Francisco", and returned to their respective ships by the same power at about eleven to eleven-thirty o'clock the same evening [Rep. Tr. 11, 26, 27, 72, 73, 77]. The Captain and the fish boss of the D/S "San Francisco" knew that appellants were going to remain ashore that evening and made no objection thereto at any time [Rep. Tr. 18, 25, 61, 62, 63, 88, 132, 176]. Appellants were instructed by the Captain or fish boss to return aboard the D/S "San Francisco" by seven o'clock a. m. [Rep. Tr. 18, 25, 62, 88, 111, 175, 176]. As a matter of fact, appellants returned prior to five o'clock a. m. [Rep. Tr. 11, 12, 17, 19, 25, 34, 62, 192, 112].

On April 22, 1947, without any cause whatsoever being given for the termination of their employment, appellants were advised by the fish boss that they were fired, although they were good workers [Rep. Tr. 93, 95, 116, 117, 124].

No reason was given for the discharge of appellants until the answer to the libel was filed in this action in the United States District Court.

A seaman may not ordinarily be dismissed for a single fault unless the same is of a highly aggravated character or circumstances show him to be an unsafe and unfit man to have aboard the vessel.

*Villa Y. Herman*, 101 Fed. 132.

Most cases arising from wrongful discharge seem to have arisen out of discharges in foreign ports, but the rule as set down in those cases recognize the general admiralty rule to be identical.

*Donna Lane*, 299 Fed. 977 (D. C. Wash. 1924);

*Alaska SS Co. v. Gilbert*, 236 Fed. 715.

Also, it is the general rule that a discharge may not be effected because of a little infraction of discipline, nor because of one act of disobedience.

*The Superior*, 22 Fed. 927;

*The Idle Hour*, 63 Fed. 1018;

*The Top Gallant*, 84 Fed. 356;

*Trent v. Gulf Pacific Lines*, 42 F. (2d) 903;

*Marsland v. The Yosemite*, 18 Fed. 331.

### III.

#### Appellants Are Entitled to Recover the Sum of \$2,632.65 Each, Less Withholding and Social Security Taxes, as Wages.

It having been stipulated that the appellants would have earned the gross sum of \$2,632.65 wages, had they remained aboard the D/S "San Francisco" from April 23 until July 7, 1947, there can be no contest as to this item.

The sum of \$26.33 should be withheld as social security taxes and that sum should be paid to the Collector of Internal Revenue by appellees to cover that particular item. Withholding taxes should be deducted from the gross wages in accordance with the law in effect at the time these wages shall be paid.

Where seamen are wrongfully discharged during the course of the voyage, they are entitled to recover for such damages as reasonably and proximately flow from the breach of the contract, but only to the extent that such damages are not reasonably, or could not reasonably have been, recouped by gainful occupation which was available to them.

*Sabat v. U. S.*, 1947 A. M. C. 1152, 72 Fed. Supp. 295.

The claim for the lay or share of what the appellants would have earned is very similar to the occurrence in the case of *The American Beauty*, 295 Fed. 513. Therein, it was held that the fishermen who shipped for the fishing season under an oral contract for a lay and who were wrongfully discharged, are entitled to recover the damages sustained by reason of such discharge, measured by the difference between their lay or share, and their net earnings during the remainder of the season.

IV.

**Appellants Are Entitled to Recover the Sum of \$375.00  
Each for Maintenance, From April 23, to July 6,  
1947, Inclusive.**

In the event of a wrongful discharge of a seaman, he is entitled to recover maintenance from the date of his discharge until he could or does return to equally lucrative employment. Roscoe's Admiralty Practice, 5th Edition, page 214, citing,

*The Elizabeth*, 2 Dods. 403;

*The Exeter*, 2 C. Rob. 261;

*The Beaver*, 3 C. Rob. 92;

*The Camilla*, Swa. 312;

*The Immacolata Concesione*, 5 Asp. 208.

The evidence before the Court is that the first employment offered the appellants was on July 7, 1947 [Rep. Tr. 68, 69, 82, 90, 121]; notwithstanding that they had endeavored to obtain employment continuously from April 23 until said date in July [Rep. Tr. 69, 120].

There is no conflict in the evidence that both appellants, single, paid for their own maintenance during their aforesaid period of unemployment subsequent to their wrongful discharge [Rep. Tr. 69, 70, 122].

**Conclusion.**

It is respectfully submitted that the appellants herein are each entitled to recover from appellees the sum of \$2,632.65, less withholding and social security taxes, and the sum of \$375.00 each as maintenance; and that the decree of the United States District Court herein dismissing the libel of appellants should be reversed.

Respectfully submitted,

DAVID A. FALL,

*Proctor for Appellants.*





## APPENDIX.

### Assignment of Errors.

#### I.

The District Court erred in finding that there was no permission given to the libelants to remain ashore at Navidad Bay, Lower California, Republic of Mexico, on a night in March, 1947.

#### II.

That the District Court erred in finding that the libelants were required to be aboard the "San Francisco" at any time prior to 4:45 a. m. on the morning said vessel was at Navidad Bay, Lower California, Republic of Mexico.

#### III.

That the District Court erred in finding that no permission was given by the Master, Nick Zamberlin, or the managing owner, Andrew Zamberlin, to the libelants, or either of them, to remain ashore.

#### IV.

That the District Court erred in finding that while the "San Francisco" was at Navidad Bay, both of the libelants were disobedient to the orders of the managing owner, Andrew Zamberlin, and the Master, Nick Zamberlin.

#### V.

The District Court erred in finding that there was good cause to discharge both of the libelants for their alleged acts and failure to act in accordance with the orders given at Navidad Bay by the managing owner, Andrew Zamberlin, and the Master, Nick Zamberlin.

VI.

That the District Court erred in finding that neither of the libelants were entitled to any sum or sums of money from and after the 22nd day of April, 1947, either as compensation as crew members or for maintenance.

VII.

That the District Court erred in not finding that the libelants were unlawfully discharged.

VIII.

That the District Court erred in not finding that the libelants were entitled to wages from the 22nd day of April, 1947, to and including the 7th day of July, 1947.

IX.

That the District Court erred in not finding the libelants were entitled to their maintenance while ashore after their unlawful discharge on April 22nd, 1947, to and including the date they reasonably could have returned to remunerative employment.

X.

That the District Court erred in finding that the discharge of the libelants and both of them, on or about April 27, 1947, was lawful.

XI.

That the District Court erred in concluding that the respondents and claimants are entitled to judgment against the libelants for their costs and expenses incurred or expended herein.